Boustead Hotels & Resort Sdn Bhd v Basiah bt Jaafar & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(W)-23–01 OF 2015
TENGKU MAIMUN, AHMADI ASNAWI AND VERNON ONG JJCA
16 JUNE 2016

Labour Law — Employment — Claim for backwages and benefits — Disciplinary action taken against employee — Employee found guilty of charges and suspended from work with no pay — Allegation of constructive dismissal — Whether employee constructively dismissed — Claim for reinstatement and backwages at Industrial Court — Application for judicial review against award awarded by Industrial Court — Industrial Relations Act 1967

The first respondent was an employee of the second respondent. A disciplinary action was taken against the first respondent. A domestic inquiry found the first respondent guilty of the charges and she was suspended from work with no pay plus a warning. The division where the first respondent worked was split into two and she was redesignated to head another department. Dissatisfied, the first respondent considered herself to have been constructively dismissed by the second respondent. The first respondent then filed a representation with the Industrial Relations Department but the matter could not be resolved and was referred to the Industrial Court. The first respondent claimed for reinstatement without any loss of wages, allowances, service, seniority, privileges or benefits. The first respondent later discovered that the second respondent had ceased to be in business. The first respondent applied for the appellant to be joined as a party to the proceeding pursuant to s 29(a) of the Industrial Relations Act 1965 ('the IRA 1967'). The appellant later sought for the interim award to be judicially reviewed but the same was dismissed by the High Court. The third respondent allowed the first respondent's claim and awarded the first respondent compensation. Dissatisfied with the said award, the appellant applied for judicial review. The High Court dismissed the said application and affirmed the final award. Hence the present appeal. The issues that were brought forth were there was no nexus between the appellant and the second respondent to render the appellant jointly liable with the second respondent; the admission of the second respondent and its absence; the consideration of unpleaded facts by the third respondent; and misapplication of the principles of law on the remedies awarded.

Held, allowing the appeal in part:

(1) The issue in respect of the nexus between the appellant and the second respondent has been ventilated and resolved during the hearing of the same before the third respondent. The third respondent in the final award had rejected the appellant's contention and ruled that the issue of nexus had been resolved vide the interim award pursuant to an application by the first respondent to join the appellant in the proceeding under s 29(a) of the IRA 1967. The third respondent in the interim award had correctly identified the relevant evidence which is the provision in the letter dated 25 May 2009 relating to staff matters which clearly established the nexus between the appellant and the first and second respondents (see para 26).

(2) The said interim award was affirmed by the High Court. This order by the High Court offered a finality of the issue as no further appeal was mounted by the appellant against the said order of the High Court. There was no error by the third respondent in coming to the said finding. The interim award was binding and effective upon the appellant by virtue of s 32(1)(a) of the IRA 1967. It was no longer a competent issue to be re-ventilated during the hearing of the said reference before the third respondent (see paras 27–28).

(3) The appellant did not appeal against the order of the High Court in the said judicial review application affirming the decision of the third respondent allowing the first respondent's application to join the appellant as a party in the reference. As such the said order of the High Court remained valid and effective. Therefore, the second respondent's admission or its absence was not an issue capable of invalidating the final award made by the third respondent against the appellant (see para 35).

(4) The first respondent had pleaded in her statement of case that she should be reinstated in her former position without, amongst others, any loss of salary. In such event, the first respondent is entitled to introduce evidence of her last drawn salary (see para 37).

(5) Under s 30(5) of the IRA 1967 the third respondent is vested with a wide discretion to award damages and/or compensation once it was proven that the first respondent was constructively dismissed by the appellant. There was no reason to interfere with the finding of the third respondent and the affirmation by the High Court judge that the second respondent indeed had constructively dismissed the first respondent. The appellant, having been joined as a party, was equally liable for such act by the second respondent (see para 51).

(6) The court allowed the appellant's appeal only in respect of the award of compensation in lieu of reinstatement amounting to RM40,000 awarded by the third respondent, which obviously could not hold water. The first respondent was entitled for the claim for back wages. The appeal of the appellant against the decision of the High Court was allowed in part. The

award for compensation in lieu of reinstatement was quashed and the award for 12 months back wages was affirmed. There would be no order as to cost and the deposit was to be refunded to the appellant (see paras 52–53).

[Bahasa Malaysia summary

Responden pertama adalah pekerja responden kedua. Tindakan tatatertib diambil terhadap responden pertama. Siasatan domestik mendapati responden pertama bersalah terhadap tuduhan-tuduhan dan dia digantung daripada kerja tanpa bayaran bersama dengan amaran. Jabatan di mana responden pertama bekerja dipisahkan kepada dua dan dia dilantik semula untuk mengetuai jabatan lain. Tidak berpuas hati, responden pertama menganggap dirinya telah dibuang kerja secara konstruktif oleh responden kedua. Responden pertama kemudiannya memfailkan representasi dengan Jabatan Perhubungan Perusahaan tetapi perkara tersebut tidak dapat diselesaikan dan dirujuk kepada Mahkamah Perusahaan. Responden pertama menuntut jawatan dikembalikan tanpa apa-apa kerugian gaji, elaun-elaun, perkhidmatan, kekananan, hak istimewa atau faedah. Responden pertama kemudiannya mendapati bahawa responden kedua telah berhenti daripada perniagaan. Responden pertama memohon untuk perayu dimasukkan sebagai pihak kepada prosiding berikutan s 29(a) Akta Perhubungan Perusahaan 1967 ('Akta'). Perayu kemudiannya memohon untuk award sementara disemak semula tetapi ianya ditolak oleh Mahkamah Tinggi. Responden ketiga membenarkan tuntutan responden pertama dan mengawardkan pampasan kepada responden pertama. Tidak puas hati dengan award tersebut, perayu memohon untuk semakan kehakiman. Mahkamah Tinggi menolak permohonan tersebut dan mengesahkan award akhir. Maka rayuan ini. Isu-isu yang dibawa ke hadapan adalah tidak terdapat neksus di antara perayu dan responden kedua untuk menyebabkan perayu bersama bertanggungjawab dengan responden kedua; pengakuan responden kedua dan ketidakhadirannya; pertimbangan fakta yang tidak diplidkan oleh responden ketiga; dan penyalahgunaan prinsip undang-undang atas remedi-remedi yang diawardkan.

Diputuskan, membenarkan sebahagian rayuan:

(1) Isu berkaitan neksus di antara perayu dan responden kedua telah dibincangkan dan diselesaikan semasa pendengarannya di hadapan responden ketiga. Responden ketiga di dalam award akhir telah menolak hujahan perayu dan memutuskan bahawa isu neksus telah diselesaikan melalui award sementara berikutan kepada permohonan oleh responden pertama untuk bersama dengan perayu dalam prosiding dibawah s 29(a) Akta. Responden ketiga dalam award sementara telah secara betul mengenal pasti keterangan relevan yang mana adalah peruntukan di dalam surat bertarikh 25 Mei 2009 berkaitan perkara-perkara pekerja yang mana jelas membuktikan neksus di antara perayu dan responden

pertama dan kedua (lihat perenggan 26).

(2) Award sementara tersebut disahkan oleh Mahkamah Tinggi. Perintah ini oleh Mahkamah Tinggi menawarkan kemuktamadan isu kerana tiada rayuan selanjutnya dibangkitkan oleh perayu terhadap perintah Mahkamah Tinggi tersebut. Tidak terdapat kesilapan oleh responden ketiga dalam mencapai kepada dapatan tersebut. Award sementara adalah mengikat dan efektif ke atas perayu mengikut s 32(1)(a) Akta. Ia tidak lagi isu kompeten untuk dibincangkan semula semasa pendengaran rujukan tersebut di hadapan responden ketiga (lihat perenggan 27–28).

(3) Perayu tidak merayu terhadap perintah Mahkamah Tinggi di dalam permohonan semakan kehakiman mengesahkan keputusan responden ketiga yang membenarkan permohonan responden pertama untuk masuk bersama dengan perayu sebagai pihak di dalam rujukan tersebut. Oleh itu, pengakuan responden ketiga atau ketiadaannya bukan isu yang mampu mentaksahkan award akhir yang dibuat oelgh responden ketiga terhadap perayu (lihat perenggan 35).

(4) Responden pertama telah memplid dalam pernyataan kesnya bahawa dia patut dikembalikan kepada jawatan sebelumnya tanpa, antara lain, apa-apa kerugian gaji. Oleh itu, responden pertama berhak untuk menunjukkan keterangan mengenai gaji terakhirnya (lihat perenggan 37).

(5) Di bawah s 30(5) Akta responden ketiga diletakhakkan dengan budi bicara luas untuk mengawardkan ganti rugi dan/atau pampasan sebaik saja ia dibuktikan bahawa responden pertama telah dibuang kerja secara konstruktif oleh perayu. Tidak ada sebab untuk campur tangan dengan dapatan responden ketiga dan kesahan oleh hakim Mahkamah Tinggi bahawa responden kedua sememangnya telah secara konstruktif membuang responden pertama. Perayu, setelah menjadi pihak, secara sama bertanggungjawab atas tindakan responden kedua (lihat perenggan 51).

(6) Mahkamah membenarkan rayuan perayu hanya berkaitan award pampasan sebagai ganti pengembalian jawatan berjumlah kepada RM40,000 diawardkan oleh responden ketiga, yang secara jelas tidak boleh dipertahankan. Responden pertama adalah berhak untuk menuntut bagi gaji kebelakangan. Rayuan perayu terhadap keputusan Mahkamah Tinggi dibenarkan sebahagiannya. Award bagi pampasan sebagai ganti pengembalian jawatan dibatalkan dan award bagi 12 bulan gaji kebelakangan disahkan. Tidak akan terdapat perintah terhadap kos dan deposit dipulangkan balik kepada perayu (lihat perenggan 52–53).]

Notes

For cases on employment in general, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1038–1676.

Cases referred to

Co-operative Central Bank Ltd (in receivership) & Ors v Rashid Cruz bin Abdullah & Ors and other appeals [2004] 1 MLJ 626; [2004] 1 CLJ 849, CA (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)

Unilever (M) Holdings Sdn Bhd v So Lai @ Soo Boon Lai & Anor [2015] 4 MLJ 326; [2015] 3 CLJ 900, FC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20(3), 29, 29(a), 30(5), (6), (6A), 32(1)(a), Second Schedule, para 1

Appeal from: Judicial Review No 25–274–12 of 2013 (High Court, Kuala Lumpur)

Fahri Azzat (Azzat & Izzat) for the appellant.
Ravindra Murugavell (Murugavell Arumugam & Co) for the first respondent.

Ahmadi Asnawi JCA:

[1] This is an appeal by the appellant against the decision of the High Court at Kuala Lumpur on 15 December 2014 in dismissing the appellant's judicial review application against the final award No 1704 of 2013 dated 16 October 2013 ('final award') in the Industrial Court reference No 7/4/1905/07.

[2] The appellant had sought the following reliefs in their application for judicial review:

(a) an order for certiorari to quash the aforesaid final award; and/or

(b) in the alternative, a declaration that the said final award was null, void and could not be enforced as it was tainted with procedural impropriety, irrationality and disproportionate and/or ultra vires s 30(5) and/or s 29 of the Industrial Relations Act 1967 (Act 177) ('the IRA 1967'); and

(c) costs.

THE BRIEF BACKGROUND FACTS

[3] The first respondent was an employee of the second respondent. Her last designation was as an Executive Housekeeper at Royal Adelphi Seremban,

effective 1 July 1999 earning about RM5,000 per month.

[4] In early 2007, disciplinary action was taken against the first respondent. A domestic inquiry was convened and the first respondent was found guilty of the charges levelled against her. She was suspended from work for 14 days with no pay plus a warning.

[5] Subsequently, the housekeeping department was split into two divisions, namely the administrative and operations divisions. The first respondent was redesignated to head the administrative division.

[6] Dissatisfied with the decision of the domestic inquiry and the subsequent developments that followed suit, the first respondent considered herself to have been constructively dismissed on 10 March 2007 by the second respondent. The first respondent then filed a representation with the Industrial Relations Department for determination. The matter could not be resolved at the conciliation stage and was then referred to the Industrial Court for determination by the Honourable Minister of Human Resources under s 20(3) of the IRA 1967. The case was then registered at the Industrial Court on 24 September 2007 vide Industrial Court reference No 7/4–1905/07.

[7] The first respondent claimed for reinstatement without any loss of wages, allowances, service, seniority, privileges or benefits.

[8] The first respondent later discovered that the second respondent had ceased to be in business. Thereafter the first respondent applied for the appellant to be joined as a party to the proceeding pursuant to s 29(a) of the IRA 1967.

[9] The application was granted by the third respondent on 11 July 2012 under interim award No 949 Tahun 2012 ('interim award'). The full purport and grounds of the third respondent is at pp 158–163, *Bahagian C, Jld III, Rekod Rayuan* ('RR').

[10] The appellant later sought for the interim award to be judicially reviewed on the ground that there was absolutely no nexus between the appellant and the second respondent that could render any award in respect of the first respondent's claim to be effective and enforceable against the appellant. The High Court dismissed the appellant's judicial review application on 29 January 2013. The said Order of the High Court is at pp 295–296, *Bahagian C, Jld III, RR*. The appellant made no further appeal to the Court of Appeal against the said dismissal. These facts were not disputed by the parties herein.

[11] The second respondent though still a party to the reference in the Industrial Court, no longer attended any of the hearings before the third respondent. The appellant, however, remained as a party to the action in view of the joinder application.

[12] The appellant conducted a search on the second respondent and found that the second respondent had been wound up since 2 December 2010 and the official receiver ('the OR') had been appointed as its liquidator.

[13] The OR who was present during the hearing on 3 July 2013 before the third respondent took the stand of not contesting the first respondent's claim and had admitted that the first respondent should file her proof of debt.

[14] The hearing proceeded with the remaining parties. The first respondent gave evidence on her case while two witnesses testified for the appellant.

[15] On 16 October 2013, the third respondent allowed the first respondent's claim and awarded the first respondent compensation in the sum of RM40,000 in lieu of reinstatement in her former position in the second respondent's employment and twelve months back wages of RM60,000 to be borne by the appellant and second respondent. The written final award of the third respondent is at pp 31–48, *Bahagian A, Jld 1, RR* ('the final award').

[16] Dissatisfied with the said award, the appellant applied for judicial review and prayed for the reliefs enumerated earlier in para 2.

[17] The learned High Court judge had on 15 December 2014 dismissed the said application, affirmed the final award of the third respondent and allowed cost of RM5,000 to be paid by the appellant to the first respondent and hence this appeal before us.

THE APPEAL BEFORE US

[18] In essence, the appellant's appeal is grounded upon the following broad issues:

(a) there was no nexus between the appellant and the second respondent to render the appellant jointly liable with the second respondent;

(b) the admission of the second respondent and its absence;

(c) consideration of unpleaded facts by the third respondent; and

(d) misapplication of the principles of law on the remedies awarded.

[19] At the onset we agree with learned counsel for the first respondent that

the first respondent has established the elements of constructive dismissal before the third respondent which was not challenged by the appellant. There was no evidence both oral and documentaries adduced by the appellant and the second respondent to contradict the evidence of the first respondent. Hence, the first respondent's evidence remained unrebutted and was properly accepted by the third respondent.

[20] The appellant's challenge is merely on the findings of its liability on account that the third respondent has held the appellant to be jointly liable with the second respondent. There is no challenge by the second respondent in respect of the said final award by way of judicial review.

OUR DECISION

The first ground — no nexus

[21] It is the appellant's contention that there is no nexus between the appellant and the second respondent to render the appellant jointly liable with the second respondent. The only relationship between them was a hotel services agreement dated 15 November 2007 whereby the appellant was to manage the second respondent's hotel for a term of 12 months. This agreement has expired. The first respondent considered herself to have been constructively dismissed on 10 March 2007, about two years prior to the said agreement.

[22] The appellant also alluded to cl 3 of the letter dated 25 May 2009 ('the 25 May 2009 letter') from the second respondent to Boustead Weld Quay Sdn Bhd at pp 278–280, *Jld III, Bahagian C, RR*, which provides:

> 3. Staff Matter
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> All the existing staff will be terminated by Azrahi on the Cut Off Date. Meanwhile these staff shall be employed by BHR with a salary not lower than the staff's current salary. Azrahi shall pay the staff's salaries on a strictly without prejudice basis calculated up to 26 May 2009. After 26 May 2009, the staff's salaries shall be paid by BHR.

[23] BHR referred in the abovesaid letter is the appellant, The appellant thus argued that based on cl 3 above, the appellant agreed to accept the transfer of the second respondent's staff only as at 26 May 2009, whereas the first respondent had already been dismissed on 10 March 2007. Hence, the said clause has no effect on the first respondent and the appellant cannot be held liable for the first respondent's constructive dismissal. Additionally it is also not disputed that the appellant had never employed the first respondent.

[24] These same issues were raised before the third respondent. In connection with the same, in the final award the third respondent held as follows at p 46, *Jld 1, Bahagian A, RR*:

> 33. Peguam Responden juga telah mengutarakan hujah yang sama di dalam Hujahan Bertulis mereka dengan mengatakan tuntutan Yang Menuntut adalah salah dan merupakan 'afterthought'. Ini kerana tidak ada nexus antara Yang Menuntut dengan Responden.
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> 34. Dengan hormatnya Mahkamah menolak hujahan itu. Sebenarnya isu itu telah pun diputuskan oleh Mahkamah dalam Award Interim No. 949 Tahun 2012 semasa Yang Menuntut membuat permohonan untuk mencantumkan responden di bawah s.29(a) Akta Perhubungan Perusahaan, 1967 dan keputusan ini telah pun dikekalkan oleh Mahkamah Tinggi pada 29.1.2013 apabila Yang Arif Hakim menolak permohonan semakan kehakiman yang difailkan oleh Responden.

[25] In the interim award No 949 Tahun 2012 alluded to above, the third respondent in allowing the first respondent's application under s 29(a) of the IRA 1967, to join the appellant as a party in the reference had stated at pp 161–162, *Jld III, Bahagian C, RR*:

> 11. Di sini Mahkamah setuju dengan hujahan peguam Yang Menuntut bahawa dokumen Exhibit 'D' dengan jelas menyatakan hubungan di antara syarikat dengan syarikat yang dicadangkan, iaitu di bawah terma 3:
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> 3. Staff Matter
>
> All the existing staff will be terminated by Azrahi on the Cut Off Date. Meanwhile these staff shall be employed by BHR with a salary not lower than the staff's current salary. Azrahi shall pay the staff's salaries on a strictly without prejudice basis calculated up to the 26 May 2009. After 26 May 2009, the staff's salaries shall be paid by BHR.
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> 12. Kandungan terma ini adalah jelas dan dengan sendirinya menolak penyataan affidavit tambahan Encik Azlan Yusof Merican yang menafikan Yang Menuntut adalah seorang pekerja kepada Boustead Hotel'.

Note: The document exh 'D' and its cl 3 referred to above by the third respondent is the same letter and cl 3 alluded to earlier in para 22.

[26] It is apparent that the issue in respect of the nexus between the appellant and the second respondent has been ventilated and resolved during the hearing of the same before the third respondent. The third respondent in the final award had rejected the appellant's contention and ruled that the issue of nexus had been resolved vide the interim award pursuant to an application by the first respondent to join the appellant in the proceeding under s 29(a) of the IRA 1967. The third respondent in the interim award had correctly identified the relevant evidence which is the provision in the letter dated 25 May 2009

relating to staff matters which clearly establish the nexus between the appellant and the first and second respondents.

[27] The said interim award was affirmed by the High Court vide order evinced at pp 295–296, *Bahagian C, Jld III, RR*. This order by the High Court offered a finality of the issue as no further appeal was mounted by the appellant against the said order of the High Court. We could find no error by the third respondent in coming to the said finding.

[28] The interim award was binding and effective upon the appellant by virtue of s 32(1)(a) of the IRA 1967. It is no longer a competent issue to be re-ventilated during the hearing of the said reference before the third respondent (in reference No 7/4-1905/07).

[29] The learned High Court judge in the appellant's application for judicial review of the third respondent's final award was in agreement with the third respondent when the same issue was raised. Her Ladyship stated in her grounds of judgment at p 542, *Rekod Rayuan Tambahan* ('RRT'):

> 11.7. The 3rd Respondent had ruled that the above term clearly showed that the 1st Respondent was the employee of the Applicant (see *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489; [1996] 4 CLJ 747; *Hochtiaf Gammon v Industrial Tribunal, Bhubaneshwar, Orissa And Ors* 1964 AIR 1746).
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> 11.8. The joinder application had been heard and decided by the 3rd Respondent with the Interim Award No. 949/2012 having been made. The very issue was ventilated in the judicial review application which was dismissed by the Court. In view of the fact the Applicant did not pursue an appeal against the decision of the High Court dated 29th January 2013, this issue could not be re-ventilated before the 3rd respondent during the hearing of the case. The Applicant having been joined as a party should be bound by the Award in respect of liability. Therefore, it is not opened to the Applicant to mount similar attack on the said Interim Award.

[30] We are in complete agreement with the learned judge. The third respondent has properly identified the proper parties necessary to be made parties in the proceedings in order to come to an effective and enforceable award. The appellant was joined as a party by virtue of the 25 May 2009 letter wherein the appellant has clearly admitted that they have taken over liability of the second respondent's employees effective 26 May 2009, ie the cut off date — see *Co-operative Central Bank Ltd (in receivership) & Ors v Rashid Cruz bin Abdullah & Ors and other appeals* [2004] 1 MLJ 626; [2004] 1 CLJ 849. Although the first respondent considered herself to have been constructively dismissed on 10 March 2007, on the cut off date (26 May 2009), her case was still pending before the Industrial Court and her claim for constructive dismissal has yet to be determined by the Industrial Court. Verily, the first

respondent has established her nexus with the appellant.

[31] We have no reason to intervene with the findings of the third respondent on account that the grounds relied upon by the third respondent were firmly supported by the evidence adduced. We would interfere only if the findings were grounded on illegality or plain irrationality — see *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625. We found none of these and equally found no basis to re-open the issue (of nexus) which had been determined with an award being handed down.

The second ground — second respondent's absence and admission

[32] The appellant next submitted that the OR of the second respondent had made an admission of the second respondent's claim but the third respondent had failed to consider the same but held that the appellant was jointly liable with the second respondent. The second respondent should be held solely liable on account of the said admission. The appellant had also disputed the status of the second respondent and claimed that there were no documents to prove the existence of the winding up order against the second respondent.

[33] The records shows that the OR had represented the second respondent in the reference before the third respondent. On 2 July 2013 the OR had appeared before the third respondent and intimated that they were not contesting the second respondent's claim and that the first respondent may file her proof of debt.

[34] However, we agree with the learned judge that although the OR had taken the stand not to contest the first respondent's claim, it did not absolve the appellant's liability as the third respondent had ruled that the appellant should be joined as a party to the proceedings and hence, both the second respondent and the appellant are to be jointly liable to satisfy any award handed down against any of them.

[35] Additionally the appellant did not appeal against the order of the High Court in the said judicial review application affirming the decision of the third respondent allowing the first respondent's application to join the appellant as a party in the reference. As such the said order of the High Court (dated 29 January 2013, at pp 295–296, *Bahagian C, Jld III, RR*) remained valid and effective. Therefore, the second respondent's admission or its absence is not an issue capable of invalidating the final award made by the third respondent against the appellant.

The third ground — consideration of unpleaded facts

[36] The appellant submitted that the first respondent has failed to plead her last drawn salary in her statement of case (at pp 93–99, *Jld III, Bahagian C, RR*) and hence, has departed from her pleaded case. The record shows that the first respondent had introduced evidence of her last drawn pay at RM5000 per month vide exh CL2 dated 1 October 2002 in the course of the hearing before the third respondent and was admitted by the third respondent over the objections of the appellant on account that it was introduced only recently.

[37] However, in our view the first respondent had pleaded in her statement of case that she should be reinstated in her former position without, amongst others, any loss of salary. In such event, the first respondent is entitled to introduce evidence of her last drawn salary. The said exh CL2 could not have been an afterthought as it was dated 1 October 2002, long before she considered herself to have been constructively dismissed on 10 March 2007.

[38] Learned counsel for the appellant was given the opportunity to cross-examine the first respondent over the production of the said exh CL2 at that stage. As such the appellant would not have suffered any prejudice nor caught by surprise as it has always been the pleaded case of the first respondent to be reinstated in her former position without loss of salary, position or seniority, which invariably behoves upon her to prove her last drawn salary.

[39] In the final award, the third respondent noted, at p 47, *Jld 1, Bahagian A, RR*:

> 39. Yang menuntut mengatakan gajinya adalah RM5000.00 semasa dibuang kerja. Ini dibuktikan dengan Eksibit CL-2, surat bertarikh 1.10.2002 yang ditandatangani oleh Pengarah Urusan Syarikat. Peguam Responden telah membantah exhibit itu kerana baru dikemukakan. Beliau telah merujuk kes *Ong Yoke Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226.
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> 38. Bagaimanapun Mahkamah menolak bantahan itu dan bersetuju dengan hujahan peguam Yang Menuntut bahawa peguam Yang menuntut *(should be the respondent)* telah diberi peluang untuk menyoalbalas saksi dan tidak timbul isu 'surprise' atau 'prejudice' seperti yang diputuskan dalam kes di atas.

[40] We have no quarrel with the approach taken by the third respondent. Indeed, it is consistent with the provision of s 30(6) of the IRA 1967, the objective of which is to facilitate the settling of trade dispute or the reference under s 20(3) of the same. Hence it behoves upon the Industrial Court not to be too legalistic in reading into the pleadings of the parties appearing before them. In fact they are enjoined to be guided always by equity and good conscience as envisaged by s 30(5) of the IRA 1967.

The fourth ground — misapplication of established laws on remedies

[41] The attack under this ground were two pronged.

[42] The third respondent found that the first respondent cannot be reinstated due to her age, which was 58 years old at the time the final award was handed down — para 36, p 47 *Jld 1, Bahagian A, RR*.

[43] Learned counsel for the appellant thus submitted that based on the Federal Court judgement in *Unilever (M) Holdings Sdn Bhd v So Lai @ Soo Boon Lai & Anor* [2015] 4 MLJ 326; [2015] 3 CLJ 900, the first respondent cannot be compensated if the workman is not eligible to be reinstated in the first place at the time of the award. The Federal Court in the aforesaid case held, at para 20, p 337 (MLJ); p 912 (CLJ):

> [20] From the phrase 'compensation in lieu of reinstatement', it is our judgment that the element of compensation will only arise when the employee is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of s 20(1) of the IRA 1967, where the primary remedy of such a representation to the Director General is for the workman 'to be reinstated in his former employment'. If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise. Corollary to that logic, it cannot be in lieu of his reinstatement ...

[44] In response to the same, learned counsel for the first respondent has graciously conceded that the judgment in *Unilever (M) Holdings Sdn Bhd v So Lai* does disentitle the first respondent from compensation in lieu of reinstatement as the first respondent had surpassed the contractual retirement age of 55 at the time the final award was handed down by the third respondent.

[45] We agreed with the position of the law as submitted by appellant's learned counsel and conceded by learned counsel for the first respondent. Hence, without more we allowed the appellant's appeal in respect of the award in the sum of RM40,000 for compensation in lieu of reinstatement handed down by the third respondent and affirmed by the learned High Court judge. We thus quashed the said award.

[46] The other complaint by the appellant's learned counsel was the contention that there was no legal basis for the back wages awarded by the third respondent to the first respondent.

[47] The third respondent in the final award accepted that the first respondent earned RM5,000 per month prior to her dismissal and had 24 months to go before her retirement at the time of dismissal.

[48] The third respondent had awarded 12 months back wages amounting to RM60,000 (12 x RM5,000 = RM60,000) to the first respondent. On the evidence that the first respondent had established her case of being constructively dismissed, the third respondent was verily correct in awarding the said award for back wages.

[49] In awarding the said award, the third respondent had acted in accordance with para 1of the Second Schedule of s 30(6A) of the IRA 1967, which states that back wages shall not exceed 24 months. The quantum of the award is most reasonable. It might well be worthy to note that a reduction of 50% was made from the back wages which is the maximum deduction allowed under Practice Note 1 of 1987.

[50] On the present facts, the third respondent did nor err in allowing the said claim for back wages. In *Unilever (M) Holdings Sdn Bhd* the award for back wages was allowed. It was only the compensation in lieu of reinstatement that was quashed. The first respondent had 24 months to go before her retirement at the point of dismissal. The 12 months back wages was thus within the third respondent's empowerment to award.

[51] We were in full agreement with the learned High Court judge that under s 30(5) of the IRA 1967, the third respondent is vested with a wide discretion to award damages and/or compensation once it was proven that the first respondent was constructively dismissed by the appellant. On facts and evidence, we could find no reason to interfere with the finding of the third respondent and the affirmation by the learned High Court judge that the second respondent indeed had constructively dismissed the first respondent. The appellant, having been joined as a party, is equally liable for such act by the second respondent.

CONCLUSION

[52] Hence, we allowed the appellant's appeal only in respect of the award of compensation in lieu of reinstatement amounting to RM40,000 awarded by the third respondent, which obviously cannot hold water in the light of the decision in the *Unilever*'s case. We, however, were unanimous in our findings that the first respondent is entitled for the claim for back wages.

ACCORDINGLY

[53] The appeal of the appellant against the decision of the High Court on 15 December 2014 is allowed in part. The award for compensation in lieu of

reinstatement is quashed and the award for 12 months back wages is affirmed. There shall be no order as to cost and the deposit is to be refunded to the appellant.

Appeal allowed in part.

Reported by Afiq Mohamad